

nathanielpunzalaninform

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IN THE UNITED STATES DISTRICT COURT  
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA, ) CRIMINAL CASE NO. 07-00075  
Plaintiff, )  
vs. )  
NATHANIEL DIAZ PUNZALAN, )  
Defendant. )  
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**OPPOSITION TO DEFENDANT'S  
MOTION TO COMPEL INFORMATION  
OF CONFIDENTIAL INFORMANT**

On March 3, 2008, defendant filed a motion to disclose the identity of the confidential informant. On March 11, 2008, defense counsel moved to withdraw as counsel. The government filed an opposition to disclosure of the identity of the confidential informant. The government now agrees to disclose the identity of the confidential informant to defendant pursuant to Brady v. State of Maryland, 373 U.S. 83 (1963) and has notified defense counsel Stephanie Flores.

On April 26, 2008, defendant Punzalan filed a motion requesting this Court to order the Government to disclose additional information pertaining to the confidential informant. Defendant seeks to obtain the following: any benefits the informant may have received, the names of any persons who provided information in this case to law enforcement; promise of payment to these persons; any promises of benefit made to such persons; written promises made

1 to informant; records of payment; prior testimony by the informant in other proceedings;  
2 psychiatric treatment of informant; and disclosure of the internal informant's file with local and  
3 federal agencies. The Government files this opposition in response.

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5 **INTERNAL INFORMANT FILES AND AGREEMENTS BETWEEN THE**  
**AGENCIESAND THE INFORMANT IS NOT SUBJECT TO DISCOVERY.**

6 **1. Internal Informant Files.**

7 Defense cites Brady v. Maryland, 373 U.S. 83 (1963) and the Federal Rules of Criminal  
8 Procedure, Rule 16 for the proposition that the contents of internal informant files pertaining to a  
9 confidential informant are discoverable. The government opposes disclosure of internal  
10 informant files.

11 In U.S. v. Roach, 28 F.3d 729 (8<sup>th</sup> Cir. 1994), a defendant asserted he was entitled to  
12 information regarding the government's confidential informant. He requested notes regarding  
13 the investigation of his case and all other investigations involving the informant, the informant's  
14 criminal history, the informant's address, and records of investigations in which Roach claims to  
15 have acted as an informant. Roach, 28 F.3d 734. The Appellate Court held "Roach argues that  
16 Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), provides the legal  
17 underpinning for his Rule 16 motion. This argument is plainly wrong. As we have stated,  
18 "Brady is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation."  
19 United States v. Krauth, 769 F.2d 473, 478 (9<sup>th</sup> Cir. 1985) (quoting U.S. v. Beasley, 576 F.2d  
20 626, 630 (5<sup>th</sup> Cir. 1978), cert. denied, 440 U.S. 947 (1979)). Brady requires the government to  
21 furnish Roach with all exculpatory information in its possession or reasonably available to it.  
22 Brady, 373 U.S. at 87, 83 s. Ct. at 1196-97; Krauth, 769 F.2d at 476. However, Roach first must  
23 make a preliminary showing that the requested information is exculpatory. See Krauth, 769 F.2d  
24 at 476. Roach makes no colorable argument that the information he sought to compel was  
25 exculpatory." Roach, 28 F.3d 729, 734. Like in Roach, defendant Punzalan's motion to compel  
26 discovery of informant files should be denied.

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2       The Federal Rule of Criminal Procedure Rule 16(a)(2) states as follows:

3       **(2) Information Not Subject to Disclosure.** Except as Rule 16(a)(1) provides  
4       otherwise, this rule does not authorize the discovery or inspection of reports, memoranda,  
5       or other internal government documents made by an attorney for the government or other  
6       government agent in connection with investigating or prosecuting the case. Nor does this  
7       rule authorize the discovery or inspection of statements made by prospective government  
8       witnesses except as provided in 18 U.S.C. §3500.”

9  
10      In U.S. v. Abonce-Barrera, 257 F.3d 959 (9<sup>th</sup> Cir. 2001), a defendant sought an affidavit

11 prepared by an Agent and a debriefing report on the informant. The Ninth Circuit held:

12     “Abonce-Barrera’s insistence that he should have been provided with both the affidavit  
13 regarding the informant prepared by Agent Rosales and the debriefing report on the informant is  
14 also ill-founded. Federal Rule of Criminal Procedure 16(a)(2) provides that, apart from certain  
15 exceptions not applicable here, “discovery or inspection of reports, memoranda or other internal  
16 government documents made by the attorney for the government or any other government agent  
17 investigating or prosecuting the case” is not authorized. See Flores, 540 F.2d at 438. (“Brady  
18 does not create any pre-trial discovery privileges not contained in the Federal Rules of Criminal  
19 Procedure.”) ...” U.S. v. Abonce-Barrera, 247 F.3d 949, 970 (2001).

20      The government is not obligated to furnish defendant with internal informant files. The  
21 government is entitled to refuse to disclose reports or other memoranda prepared by government  
22 attorneys and agents in connection with an investigation or prosecution under Fed.R.Crim.Pro.  
23 16(a)(2). Defendant’s blanket request for “Guam Police Departments’ internal informant file,  
24 the ATF’s internal informant file, if any, as well as the DEA’s internal informant file” (Motion to  
25 Compel, P. 3) is unsupported by law or authority.

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1       The government's disclosure obligations are governed by statute, specifically 18 U.S.C.  
2 §3500, known as the Jencks Act<sup>1</sup>. The Jencks Act does not require the government to disclose  
3 the informant files as an agent's summaries and memoranda are exempt from disclosure.

4       In Palermo v. United States, 79 S. Ct. 1217 (1959), a defendant sought a revenue agents'  
5 memorandum summarizing the results of a defendant interview. The trial judge refused to order  
6 production since the agent's memorandum did not fall under 'statements' under the Jencks Act  
7 as defined in 18 U.S.C. §3500(e). Palermo, 79 S. Ct. 1221. The Second Circuit Court of  
8 Appeals affirmed the lower court's decision. The Supreme Court granted certiorari to explain  
9 the scope and meaning of the Jencks Act. In Palermo, the Supreme Court reviewed Congress'  
10 rational to protect documents other than statements of the defendant from discovery:

11      "One of the most important motive forces behind the enactment of the legislation was  
12 the fear than an expansive reading of Jencks would compel the undiscriminating  
13 production of agent's summaries of interviews regardless of the character of their  
14 completeness. Not only was it strongly feared that disclosure of memoranda contained in  
15 the investigative agent's interpretations and impressions might reveal the inner workings  
16 of the investigative process and thereby injure the national interest, but it was felt to be  
grossly unfair to allow the defense to use statements to impeach a witness which could  
not fairly be said to be the witness' own rather than the product of the investigator's  
selections, interpretations, and interpolations. The committee reports of both Houses and  
the floor debates clearly manifest the intention to avoid these dangers by restricting  
production to those statements specifically defined in the bill. ... The purpose of the Act,

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18      <sup>1</sup> Section 3500. **Demands for production of statements and reports of witnesses.** (a) In any  
19 criminal prosecution brought by the United States, no statement or report in the possession of the United  
20 States which was made by a Government witness or prospective Government witness (other than the  
defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on  
direct examination in the trial of the case.

21      (b) After a witness called by the United States has testified on direct examination, the court shall,  
22 on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of  
the witness in the possession of the United states which relates to the subject matter as to which the  
23 witness has testified. If the entire contents of any such statement relates to the subject matter of the  
testimony of the witness, the court shall order it to be delivered directly to the defendant for his  
examination and use. ...

24      (e) the term "statement", as used in the subsections (b), ( c) and (d) of this section in relation to  
any witness called by the United States, means -

25       (1) any written statement made by said witness and signed or otherwise adopted or approved by  
him;

26       (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a  
substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously  
27 with the making of such oral statement; or

28       (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said  
witness to a grand jury. 18 U.S.C. Section 3500.

1           its fair reading and its overwhelming legislative history compel us to hold that statements  
2           of a government witness made to an agent of the Government which cannot be produced  
3           under the terms of 18 U.S.C. §3500, cannot be produced at all.” Palermo, at 1224.

4           The Supreme Court held that an agent’s internal memorandum is not subject to discovery  
5           under the Jencks Act. “We think it consistent with this legislative history, and with the generally  
6           restrictive terms of the statutory provision, to require that summaries of an oral statement which  
7           evidence substantial selection of material, or which were prepared after the interview without the  
8           aid of complete notes, and hence rest on the memory of the agent, are not to be produced.

9           Neither, of course are statements which contain the agent’s interpretations or impressions.”

10           Palermo, at 1225. Disclosure of internal memoranda by law enforcement personnel is  
11           prohibited under the Jencks Act.

## 12           **2. Other Cases Involving Informant.**

13           Defendant seeks disclosure of informant files in this case “as well as any informant files  
14           maintained on any other cooperating individuals or confidential informants”. (Motion to  
15           Compel, p. 4) Defendant appears to be requesting access to each of the cases the informant may  
16           have worked. Under Brady, there must first be a showing of materiality. See Kyles v. Whitley,  
17           514 U.S. 419, 434-38 (1995); Manning, 56 F.3d at 1198 (“Evidence is material for Brady  
18           purposes only if there is a reasonable probability that, had it been disclosed to the defense, the  
19           result of the proceeding would have been different.”).

20           The Ninth Circuit has addressed a defendant’s request for a list of informant’s cases in  
21           U.S. v. Abonce-Barrera, 257 F.3d 959 (9<sup>th</sup> Cir. 2001). The Ninth Circuit held “In United States  
22           v. Flores, 540 F.2d 432 (9<sup>th</sup> Cir. 1976), we held that a request “to disclose the names and  
23           numbers of the prior case in which the informant had testified on behalf of the government” was  
24           not material based only on a “hunch” that the informant may have tampered with evidence in  
25           other cases. Id. at 437-38. Similarly, Abonce-Barrera has offered nothing to support his  
26           proposed fishing expedition beyond stating that it might have been useful. See also United  
27           States v. Cutler, 806 F.2d 933, 935 (9<sup>th</sup> Cir. 1986)(holding that additional detailed information  
28           about a previous unrelated investigation involving an informant could be withheld after

1 balancing the government's interests in insuring the informant's safety)." Abonce-Barrera, 275  
2 F.3d 959, 970. Here, defendant's request is unsupported by a showing of materiality and should  
3 be denied.

4 **3. Informant Benefits/Rewards/Inducements**

5 The Government understands its obligations under Giglio v. United States, 405 U.S. 150  
6 (1972) to disclose any agreements relevant to credibility. The government will address this issue  
7 directly before the Court.

8

9 **CONCLUSION.**

10 The government agrees to reveal the identity of the confidential informant. However, the  
11 defendant's request for internal informant files and their contents should be denied as they are  
12 not the "statements" of a defendant pursuant to 18 U.S.C. §3500, and are excluded from  
13 discovery pursuant to Fed.R.Crim.Pro. 16(a)(2). The government agrees to comply with the  
14 obligations set forth in Brady and Giglio and will raise this issue directly before the court.

15 Respectfully submitted this 11th day of July, 2008.

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18 By /s/ Rosetta L. San Nicolas  
19 ROSETTA L. SAN NICOLAS  
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